ARGUMENT

I. THE COURT BELOW MISINTERPRETED THIS COURT'S DECISION IN *ROGERS* TO ESTABLISH A CAUSATION STANDARD UNDER FELA THAT IS INCONSISTENT WITH CONGRESS' INTENT

For the second time in two years, a case arising out of rather routine events occurring during a railroad workday has raised a question about the fundamental nature of the Federal Employers' Liability Act and the meaning of an important precedent of this Court. In *Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir.), *cert. denied*, 540 U.S.1096 (2003), the Sixth Circuit overruled a prior precedent which it considered no longer good law in light of this Court's decision in *Rogers*, ultimately holding that the FELA eliminated the concept of proximate cause. The decision below, largely relying on the *Richards* holding, reached the same result. Both cases are grounded in an expansive and erroneous reading of this Court's decision in *Rogers*.

FELA is an anachronism in the law of compensation. Over half a century ago, in the course of deciding several cases arising under FELA, some members of this Court expressed reservations over Congress' decision to continue in place a tort-based system for compensating railroad employees injured on the job. As a means of compensating railroad employees for industrial accidents, Justice Douglas characterized FELA as "crude, archaic, and expensive as compared with the more modern systems of workman's compensation." *Bailey v. Cent. Vermont Ry.*, 319 U.S. 350, 354 (1943). Similarly, Justice Frankfurter opined that "[t]o fit the hazards of railroad employment into the requirements of a negligence action is to employ a wholly inappropriate procedure . . ." *Stone v. N.Y. Cent. & St. Louis R.R.*, 344 U.S. 407, 410 (1953).[4]

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[4] Earlier, Justice Frankfurter had criticized FELA as a "cruel and wasteful mode of dealing with industrial injuries [that] has long been

These dicta manifested a policy disagreement on the part of some Justices with Congress' approach to rail industry compensation. However, despite occasional disagreement among the Justices over the outcome of individual cases, and notwithstanding concern that it was a public policy anachronism, this Court recognized its obligation to interpret FELA consistent with the principles of common law negligence.[5] More recent FELA jurisprudence confirms this approach. In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), after issuing a reminder that FELA "does not make the employer the insurer of the safety of his employees while they are on duty,"[6] this Court explained that FELA "is founded on common-law concepts of negligence and injury." *Id.* at 543. Three years later, in *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 429 (1997) this Court reiterated this view of FELA.[7]

On the other hand, as the ruling below demonstrates, some lower courts have not been so faithful to FELA's intent. Instead, they seem to have taken the earlier criticisms of FELA as a call to action, determining that although Congress used the language of negligence, it meant to confer on rail

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displaced in industry generally by the insurance principle that underlies workmen's compensation laws." *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949)(Frankfurter, J. concurring).

[5] Justice Douglas expressed the sentiment that "however inefficient and backwards [FELA] may be, it is the system which Congress has provided." *Bailey*, 319 U.S. at 354. Justice Frankfurter felt similarly duty-bound. "It is, of course, the duty of courts to enforce the Federal Employers' Liability Act, however outmoded and unjust in operation it may be." *Wilkerson*, 336 U.S. at 66.

[6] Quoting *Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959) and *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947).

[7] *Gottshall* and *Buckley* both established limiting rules for recovery for negligent infliction of emotional distress as being consistent with common law principles at the time of FELA's enactment.

employees the right to recover without having to prove the traditional elements of a cause of action in tort.

The ruling below falls well within the camp of those that would interpret FELA as calling on railroads to be the insurers of their employees' safety. To achieve this result, the court relied on the fiction that in *Rogers* this Court fundamentally altered the concept of causation as it applies to FELA cases, eschewing the clear causation rule which applies in the circumstances presented in this case, enunciated by this Court in *Davis*. Ignoring that precedent, the court below opted instead to add to a line of cases that have served to move FELA ever closer to being a workers' compensation statute which, for better or worse, is contrary to Congress' intent in enacting FELA. As Justice Roberts once felt compelled to admonish, it is not within the "judicial function to write the policy which underlies compensation laws into acts of Congress when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence." *Bailey*, 319 U.S. at 358 (1943). In the words of Justice Roberts, the decision below "strains the law of causation to accord compensation when the employer is without fault." *Id.*

A. Though FELA Expressly Modified Some of the Then Prevailing Features of the Common Law, It Retained the Fundamental Principles of the Law of Negligence

In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted FELA as a tort-based remedy for railroad employees injured on the job, who, at that time, had little legal recourse. This was an era when working in the railroad industry was undoubtedly hazardous, and resulted in a great human toll.[8]

[8] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, *Statistics of Railways in the United States 1908* 41, 99 (1909).

Moreover, the common law of negligence had erected a number of often insurmountable barriers as obstacles to recovery for injuries sustained by workers.[9]

Against this backdrop, and with the goal of providing a progressive and meaningful remedy, Congress enacted FELA, initially in 1906, and, after addressing constitutional flaws in the original statute, again in 1908.[10] Through FELA, Congress sought to address the perils posed by railroad employment and to provide compensation to employees who suffered injury or death as a result of their employer's negligence. *See Gottshall*, 512 U.S. at 542.

When it enacted FELA, Congress adopted what was at the time the universal compensation model in the United States: the law of negligence. The policy embodied in FELA was that railroads were to be liable in damages for injuries sustained by employees in the course of their railroad employment when such injuries were caused by the negligence of the railroad. To ameliorate the harsh results which often were a consequence of prevailing legal doctrine, Congress modified some aspects of the existing common law in an effort to promote recovery. For example, the defenses of assumption of the risk and the fellow servant doctrine were eliminated. 45 U.S.C. § 54; *See also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916).

FELA was an early example of a comparative fault statute, at the time a significant innovation in tort law. Rather than barring recovery if the employee's negligence contributed to

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[9] Any contributory negligence by the plaintiff usually barred recovery. *E.g., Farwell v. Boston & Maine R.R.*, 4 Metc. 49 (Mass. 1842). Recovery also was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Souix City R.R.*, 9 N.W. 581 (1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875).

[10] *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908); *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

the injury, under FELA damages are reduced in proportion to the employee's negligence. 45 U.S.C. § 53. This opened the opportunity for recovery in many instances where it previously would have been denied.

Additionally, shortly before and after FELA's enactment, Congress enacted railroad safety statutes regulating freight car components and locomotives.[11] Although they do not confer an independent right of action on injured employees, the SAA and LIA are substantively, if not in form, amendments to FELA. *Urie v. Thompson*, 337 U.S. 163, 188-89 (1949). Violation of these statutes constitutes negligence as a matter of law in personal injury lawsuits brought under FELA. *Id.* at 189; *O'Donnell v. Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949). In addition, violation of a safety statute renders any employee contributory negligence irrelevant. 45 U.S.C. § 53. Although the railroad safety statutes impose an absolute duty on railroads, just as is the case with other negligent conduct, FELA liability for a safety statute violation attaches only if there is a causal connection between the violation and the complained of injury. *Carter v. Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434-35 (1949).

In attempting to ameliorate the harsh realities of railroad employment at the turn of the nineteenth century, it is indisputable that Congress envisioned that the remedy available under FELA would be consistent with the common law concept of negligence, a point that has consistently been recognized by this Court.[12] Consistent with that approach, subse-

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[11] *See* Safety Appliances Act of 1893 (SAA), c. 196, 27 Stat. 531 (now codified at 49 U.S.C. § 20301, *et seq.*); Boiler Inspection Act, c. 103, 36 Stat. 913 (1911) (now known as the Locomotive Inspection Act (LIA), and codified as amended at 49 U.S.C. §§ 20701-20703). Authority to promulgate regulations under these statutes was delegated first the Interstate Commerce Commission and then the Department of Transportation.

[12] In *Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916), this Court observed that the rights and obligations under FELA "depend upon applica-

quent to FELA's enactment, this Court issued a number of decisions confirming that proximate cause is the applicable causation standard under FELA. *See* cases cited in Pet. at 8, n. 2 and 3.

Reconciling several prior opinions, in *Davis* this Court set forth the principle by which courts are to determine whether there is a sufficient causal connection between the employer's conduct and the injury to support recovery. The Court held that "on the one hand, an employee cannot recover" if the employer's negligence or failure to comply with a safety statute

> is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him . . .

263 U.S. at 243. Though *Davis* involved an alleged violation of a safety statute, the same causation standard applies where employer negligence is the alleged basis of liability. Thus, the proximate cause rule enunciated in *Davis*, a case that has never been overruled or questioned by this Court, applies to all FELA cases.

The treatment of the *Davis* precedent by the court below is curious and telling. In its initial opinion, the court suggested that *Davis* was no longer good law, Pet. at 14a, n.6, finding petitioner's reliance on *Davis* misplaced as it "predate[d] *Rogers*." In an amended opinion. the court purports to distinguish this case from *Davis*, on the grounds that in this case the employer's negligence played "the slightest" role in pro-

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ble principles of common law. . . . Negligence by the railroad is essential to a recovery." *Urie*, 337 U.S. at 182 (FELA "is founded on common-law concepts of negligence and injury.")

ducing the injury. Pet at 7a. However, a reading of even the amended opinion as a whole leads to the conclusion that the court below was operating on the premise that *Rogers* released FELA plaintiffs from the obligation to prove their injuries proximately resulted from the railroad's negligence.

To reach its result, the opinion below relies primarily on *Richards*, a decision which is premised on the notion that *Rogers* eliminated the requirement that to be compensable under FELA an injury must be the proximate result of the carrier's negligence. *Richards* overruled a prior Sixth Circuit decision that had followed *Davis* and set forth a similar test of proximate cause, *Reetz v. Chicago & Erie R.R.*, 46 F.2d 50 (6th Cir. 1931), a holding which the court below adopted (noting with approval that "in light of *Rogers*," *Richards* "rejected *Reetz*.")[13] By removing the reference to *Davis* from footnote 6 of its revised opinion, the court below may have sought to avoid the inference that it considered the case to no longer be good law in light of *Rogers*. However, the opinion speaks for itself, and cannot escape the conclusion that it is premised on the notion that *Rogers* overruled earlier precedent on proximate cause.[14] However, if *Davis* is no longer good law, it is this Court, and this Court alone, that must make that decision.

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[13] In language strikingly similar to that employed in *Davis*, the *Reetz* court explained that "there is liability only where the failure of the appliance not only creates a condition under which, or an incidental situation in which the employee is injured, but where the defective appliance is itself the efficient cause of or the instrumentality through which the injury is directly brought about." 46 F.2d at 52. Rejecting *Reetz*, as the court below unquestionably did, is tantamount to rejecting *Davis*.

[14] The court dismissed the precedential effect of cases cited by petitioner because they are "based on the reasoning of the now overruled *Reetz*." Pet. at 6a.

B. The Proximate Cause Standard of *Davis* Remains the Law Today and *Rogers* Neither Compels Nor Supports the Decision of the Court Below

The court below erred because a careful reading of *Rogers* reveals that it was not intended to usher in a new era of FELA litigation, in which all notions of proximate cause were to be disregarded. *See* Pet. at 11-16. The opinion in *Rogers* focused on the phrase "in whole or in part," contained in the provision of FELA establishing liability for railroad negligence. 45 U.S.C. § 51.[15] *Rogers* read this phrase to mean that Congress intended that a railroad could be found liable if its negligence was a cause, even if not the only cause, of the injury. And, *Rogers* held, in cases where the evidence reasonably lends itself to supporting more than one alternative cause, the jury is to have the opportunity to decide among them. "It does not matter that, from the evidence, the jury may also with reason, on the grounds of probability, attribute the result to other causes, including the employee's contributory negligence." 352 U.S. at 506. Thus, *Rogers* rejected only an aberrant notion of proximate cause—requiring that the defendant's negligence be the "sole, efficient, producing cause of the injury"—that prevailed in certain common law courts.

In the years following *Rogers*, many courts properly understood that decision to mean simply that if evidence is presented that might reasonable lead to differing conclusion as to the cause of any injury, or to the conclusion that multiple causes contributed to the injury, one among them railroad negligence, the case must go to the jury. *E.g., Ely v. Reading Co.*, 424 F.2d 758 (3rd Cir. 1970); *Funseth v. Great Northern*

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[15] "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury [or death] while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence [of the carrier]."

Ry. Co., 399 F.2d 918 (9th Cir. 1968). In *Ely*, the court interpreted *Rogers* to mean "that it is not a requisite that the employer's negligence be the entire cause of the accident." 424 F.2d at 762. Instead, the "jury must be instructed to consider that if the negligence of the defendant was one of the proximate causes of the accident, then liability exists." *Id.* In *Funseth*, the court explained that *Rogers* did not purport "to define causality other than to point out that, according to the plain and direct language of the statute, the negligence of the railroad need not be either the sole or the whole cause of the employee's injury" to support a finding of liability. 399 F.2d at 922. *See also Pehowic v. Erie Lackawana R.R.*, 430 F.2d 697 (3rd Cir. 1970)(If a jury could find among two reasonable alternative inference, one of which could support liability, the jury should have that opportunity.); *Strobel v. Chicago, Rock Island and P. R.R.*, 96 N.W.2d 195 (Minn. 1959). ("It is elementary that the negligence of each of two or more actors may be the proximate cause of an injury and that no actor's negligence ceases to be the proximate cause merely because it does not exceed the negligence of other actors." *Id.* at 200.).[16]

As *Davis* made clear, when Congress enacted FELA, it did not intend to abrogate entirely the concept of proximate cause and to substitute the notion that any negligent act that can be linked to a chain of events ultimately resulting in an injury justifies a finding of liability. Moreover, no intervening events between the *Davis* and *Rogers* decisions call into question the continued validity of the former holding. The

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[16] When this case reached the summary judgment stage it simply did not present a question which *Rogers* addresses. The evidence does not lend itself to a jury choosing among multiple possible legal causes of the injury: it is clear and undisputed that the plaintiff's lifting of the knuckle (an event to which no railroad negligence has been attributable) led to the injury. Rather, the question is whether the alleged negligence—which caused the knuckle to be where it was when the plaintiff subsequently lifted it—was the legal cause, in whole or in part, of the injury.

phrase "in whole or in part" has been part of the provision establishing a cause of action under FELA since the statute's enactment. And, Congress has taken no action to impel a reexamination of FELA, or to justify a judicial retreat from the common law concepts which Congress engrafted onto FELA in 1908.

C. Elimination of the Requirement that a Compensable Injury Must Proximately Result From Railroad Negligence Will Have Serious Consequences for Railroads

This case, like the *Richards* decision, is an example of a lower court relying on *Rogers* to interpret FELA in a manner never intended by Congress or this Court. Under the approach utilized by the court below, in determining whether the requisite causation exists between alleged railroad negligence and the injury, the inquiry is not limited to the event or series of events directly leading to the injury. Instead, the ruling below pulls FELA in the direction of no-fault workers' compensation laws, under which the fact that an injury occurred on the job generally gives rise to an obligation to pay compensation regardless of who or what caused the injury. This clashes with the principle, recognized on numerous occasions by this Court, that FELA does not make the employer the insurer of employee safety and health. *See supra* note 6. Thus, this decision improperly undertakes to legislate, by imposing a public policy choice which, even assuming it represents a sound choice, goes beyond the role of the judiciary.[17]

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[17] The jumping off point for the court below, its characterization of FELA as "an avowed departure from the rules of the common law" (quoting *Sinkler v. Missouri Pac. RR.*, 356 U.S. 326 (1958)), missed the key point that "[o]nly to the extent" that Congress expressly altered some of the common law concepts that prevailed in the early nineteenth century when FELA was enacted, is FELA "an avowed departure from the rules of the common law." *Gottshall*, 512 U.S. at 544.

In failing properly to bound a FELA defendant's liability, the precedent established by this case (and *Richards* before it) upsets the balance struck by Congress when it enacted FELA and greatly expands potential railroad liability under FELA. This case involved an employee undertaking a task he considered "a regular part of his job," one that he had undertaken "over and over again" in the past. Pet. at 3a. Nothing about the task, or the manner in which respondent was required to carry it out, could be tied to negligent conduct on the railroad's part. No evidence suggested that having rail employees lift knuckles in the course of their daily routines is an unreasonable or dangerous practice. Yet, the court held that respondent's injury was "within the risk created by NSCR's negligence," simply because respondent found himself to be in a position to perform this routine task at a particular time and place because of a prior negligent act. Incongruously, if another employee had injured himself in the same way as respondent while lifting an identical knuckle lying in the same location, under the same conditions, with the only difference being the knuckle having found its way to the ground not as the result of a missing pin, but instead by some innocent reason, there would not appear to be any basis for recovery.

A natural consequence of the ruling below is that whenever an injury is associated with the performance of a routine task, if the circumstances that led to the employee having to perform the task can be linked back to any prior railroad negligence, the railroad may be liable regardless of how devoid of negligence the actual events causing the injury. For example, a train might derail because of some negligence on the part of the railroad. After the derailment (or other railroad accidents) there typically will be many task to be undertaken to return the line to normal operations: repairs to track and roadbed, removal of damaged cars; clean up of lading; other remediation, and the like. If the reasoning of the case below is allowed to stand, so long as some railroad negligence can be

tied, in whole or in part, to the initial accident, any employee injured while engaged in one of those post-accident tasks may be entitled to compensation even if the events directly causing the injury involve no negligent conduct by the railroad whatsoever. As in the case below, plaintiffs will argue that had the railroad not been negligent in causing the accident, the employee would not have been required, at that time and place, to undertake the post accident task which led to the injury.

FELA was not meant to make the employer liable when employees are injured performing routine tasks in a safe and normal manner where railroad negligence did not proximately cause the injury. In contrast, under workers' compensation the mere fact that the injury occurred on the job will give rise to the right to benefits in accordance with the particular scheme under whose jurisdiction the employer fell. This is how FELA and workers' compensation differ fundamentally. As members of this Court have suggested in the past, while it may be advisable for Congress to enact a railroad workers' compensation law, to date Congress has not chosen to do so.

II. THIS COURT SHOULD TAKE THE OPPORTUNITY TO CLARIFY ITS DECISION IN *ROGERS* BECAUSE LOWER COURTS CONTINUALLY HAVE RELIED ON *ROGERS* TO MAKE SUBSTANTIVE CHANGES TO FELA

In addition to resolving the deep conflict among the lower courts regarding the proper standard of causation under FELA, *see* Pet. at Part II, review of this case would provide an opportunity for this Court to clarify *Rogers*, as continued misinterpretations of that decision have become the basis for lower courts to engraft, sometimes subtly, sometimes blatantly, substantive changes onto FELA which depart markedly from Congress' intent. The fact that it has been nearly 50 years since this Court has directly considered the question of causation under FELA may have caused lower courts to lose

sight of the fact that *Rogers* addressed only a limited question regarding causation, *see supra* p. 11, and, consequently, to fill in this Court's silence with their own increasingly attenuated views on causation and other key concepts under FELA. The cumulative effect of lower court decisions that have read far more into *Rogers* than warranted has been drastically to change the landscape under which FELA cases are litigated. Given the drift that has occurred during the almost half century since *Rogers*, this Court should grant the petition in order to assist lower courts in maintaining uniformity in interpreting causation—an issue that goes to the heart of any negligence-based claim—under FELA, a statute under which several thousand lawsuits are filed every year.[18]

Some courts have converted the *Rogers* holding from a test for a jury case to a substantive standard of causation on which the jury is to be instructed. Other courts, no doubt to effectuate FELA's humanitarian purposes, and through a subtle rearrangement of its language, have held that *Rogers* establishes a standard of care that differs qualitatively from ordinary negligence, that of "slight" negligence. "If the defendant's negligence, however slight, plays any part in producing plaintiff's injury, the defendant is liable." *Beeber v. Norfolk Southern Corp.*, 754 F.Supp. 1364, 1372 (N.D. Ind. 1990)(citing *Rogers*); *Walsh v. Consolidated Rail Corp.*, 937 F.Supp. 380, 382 (E.D. Pa. 1996)("FELA imposes a stringent duty of care. 'Slight negligence necessary to support a FELA action, is defined as a failure to exercise *great* care . . .'"); *Pry v. Alton & Southern Ry. Co.*, 598 N.E.2d 484, 499 (Ill. App. 1992)(Under FELA "[o]nly slight negligence of the defendant needs to be proved . . ."). *But cf. Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3rd Cir. 1995), holding that FELA incorporates the concept of

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[18] This Court has granted *certiorari* to address claims that the lower courts misconceived the meaning of a prior Supreme Court decision. *See e.g., Wilkinson v. United States*, 365 U.S. 399 (1961).

ordinary negligence, and questioning whether the concept of "slight care" even exists in the law. *See also Peyton v. St. Louis Southwestern Ry. Co.*, 962 F.2d 832, 833 (8th Cir. 1992).

Despite numerous holdings by this Court and others that the standard of care under FELA is common law ordinary negligence, *Gottshall*, 512 U.S. at 543; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335-38 (5th Cir. 1997), under the influence of *Rogers* some lower courts have moved FELA closer to being a workers' compensation law and railroads to being insurers of their employees' health and safety. *Williams v. Long Island R.R.*, 196 F.3d 402 (2nd Cir. 1999) (The Second Circuit construes FELA "as creating a relaxed standard for negligence and causation." *Id.* at 406); *Cent. of Georgia v. Kelson*, 505 S.E.2d 803, 808 (Ga. App. 1998) (only slight negligence, defined as a failure to exercise *great* care, is necessary to support a FELA action). In *Ackley v. Chicago and Northwestern Transp. Co.*, 820 F.2d 263 (8th Cir. 1987), where the plaintiff's right to a jury determination resulted in an adverse outcome, FELA was interpreted to require that a new jury try again. Despite reference to the "emphasis to be placed on the jury's role under FELA," the court reversed a jury finding for the railroad, holding that it is improper to instruct the jury that a railroad may assume that its employees will exercise reasonable care. ("[D]uty to provide a reasonably safe place to work . . . is broader under [FELA] than a general duty of care." 820 F.2d at 267.).

Various readings of *Rogers* also have muddied the concept of foreseeability under FELA. *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824 (2nd Cir. 1994)(Holding that "under FELA and the case law construing it, the common-law negligence standards of foreseeability and causation normally applied in summary judgment are substantially diluted." *Id.* at 825); *Mitchell v. Missouri-Kansas-Texas R.R.*, 786 S.W.2d 659

(Tex. 1990) ("Foreseeability is thus not part of the causation standard as to negligence in FELA cases." *Id.* at 661).[19]

In a revealing passage, one court described the state of adjudication under FELA, all but admitting that, despite protesting to the contrary, courts have amended FELA to make it resemble more a workers' compensation law than a tort statute (albeit one in which awards are not subject to the caps and limits that characterize true workers' compensation laws):

> Having accorded the customary, albeit somewhat psittacistic, deference to the non-insurer aspect of the FELA defendant, we will now proceed to discuss that statute as it is. Before doing so, we observe that while the FELA in its terms does not purport to border on a workman's compensation act, certain parallelism may be found. We will not assume that Congress is unaware of the judicial gloss that the Act has received. If the Act as it has been interpreted and applied does not correctly reflect what was intended by the legislative branch then the change must be made there. The duty of this court is to follow what is now well-established authority.

Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243, 1246 (7th Cir. 1974). Notwithstanding this candid assessment of FELA jurisprudence, it remains the proper role of the courts faithfully to interpret a statute as Congress intended, not as they wish the statute to have been drafted, with the fallback that the onus is then shifted to Congress to amend the statute if it is not happy with the interpretations given.

The movement of FELA toward the concepts of no-fault is particularly troublesome because of another fundamental difference between FELA and workers' compensation statutes: workers' compensation benefits are capped; on the other hand, once the plaintiff clears the hurdle of proving that the em-

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[19] *But cf. Nivens v. St. Louis Southwestern Ry. Co.*, 425 F.2d 114 (5th Cir. 1970), finding that while *Rogers* called for a "less demanding burden of proving causal relationship", nonetheless found that "foreseeability is 'an essential ingredient' of negligence under the Act." 425 F.2d at 118.

ployer's fault caused his or her injury, FELA contains no caps or limitations on the amount of damages that may be recovered. In FELA cases, juries typically are given wide discretion to make determinations of fact, including questions about the extent of damages suffered. *Schirra v. Delaware, L. & W. R.R.*, 103 F.Supp. 812, 823 (M.D. Pa. 1952) ("[T]he jury would be justified in awarding plaintiff a substantial sum of money to fairly compensate him for past and future pain, suffering and inconvenience, and the amount to be awarded is peculiarly within the discretion of the jury, provided it is within reason."); *Seaboard Coast Line R.R. v. Gillis*, 321 So.2d 202, 208 (Ala. 1975) ("the extent of damages under FELA is peculiarly a fact question for the jury.").[20] Thus, large awards, while not the norm, are not uncommon. *E.g., DeBiasio v. Illinois Central R.R.*, 52 F.3d 678 (7th Cir. 1995) ($4.2 million award affirmed). In contrast, under workers' compensation, "[t]he amount of compensation for disability depends on the worker's previous earning level, for most acts award a percentage of average wage, somewhere between a half and two-thirds. But practically all acts also set a maximum in terms of dollars per week." A. Larson & K. Larson, *Larson's Workers' Compensation Law* § 1.03[5] (2000 ed.). "It was never intended that compensation payments [under workers' compensation] should equal actual loss, if for no other reason than that such a scale would encourage malingering." *Id.*

Nearly half a century after it was decided by this Court, *Rogers* has become a malleable tool which lower courts have utilized to implement what they believe are beneficial results from the standpoint of public policy, *i.e.*, assurance that rail employees suffering work-related injuries receive compensation. However, by enacting and retaining a negligence law,

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[20] A compensatory damages award under FELA will be deemed excessive only if it "shock[s the] judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993) ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

Congress chose to not provide assurances of recovery in all cases of job-related injuries in the rail industry.

Although some courts continue to be faithful to Congress' intent,[21] to many lower courts, the elements of negligence under FELA blend together, imposing an overall "slight" burden on plaintiffs. This erroneous interpretation of FELA is so entrenched among many lower courts—with a consequent pronounced effect on FELA litigation—that liability is a foregone conclusion in many jurisdictions in all but a very few FELA lawsuits. Review of this case will provide this Court with a long overdue opportunity to clarify *Rogers* and thereby assure that federal and state trial and appellate courts interpret FELA as Congress originally intended.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted

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[21] *See e.g., Williams v. Southern Pac. Transp. Co.*, 813 F.Supp. 1227, 1230 (S.D. Miss. 1992)("A plaintiff need not establish that the defect was the sole cause of injury [citations omitted], as contributory proximate cause is sufficient."); *Chapman v. Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991)("To recover under the Federal Employers' Liability Act, an employee must prove . . . that the alleged negligence is a proximate cause of the employee's injury.")